

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA
dc

UNITED STATES OF AMERICA,)
 Plaintiff,)
v.) CR-00S-422-S
)
ERIC ROBERT RUDOLPH,)
 Defendant.)

**DEFENDANT'S MOTION TO EXTEND TIME
FOR FILING RULE 16b(1)(C) SUMMARIES**

COMES NOW defendant, Eric Robert Rudolph, by and through counsel, and moves this court to extend the deadline for filing the Fed. R. Crim. P. 16b(1)(C) expert witness summaries from the currently set date of September 7, 2004 to thirty days following full compliance by the government with defendant's motion for discovery of laboratory bench notes and other items crucial to a fair assessment of the government's scientific evidence.

On January 9, 2004, defendant made an informal request to the government for the disclosure of laboratory bench notes and 13 other categories of information which the defense considered crucial to a fair assessment of the government's scientific evidence. The government denied that request. Consequently, a motion seeking the disclosure of the same 14 categories of information was filed on April 8, 2004 (Doc. 181). At the hearing of the motion on May 18, 2004, as indicated in the magistrate's order, "the government agree(d) to produce most of the requested material...." (Doc. 225) Despite the government's agreement, the requested information still has not been produced as set

forth in detail below. As a result, defendant's experts are not in a position to finalize their opinions because they have not seen and reviewed all of the necessary information relevant and required for the formation of their opinions.

By order filed June 23, 2004, this Court granted defendant's motion to reconsider the trial date in this case for the reasons described in that motion and set forth a schedule of deadlines for the parties. (Doc. 255) Relevant to this motion, the Order directs defendant to file Rule 16 (b)(1)(C) summaries on September 7, 2004. By the present motion, defendant seeks additional time to provide relevant Rule 16 summaries.

Relevant Procedural History

As early as July 24, 2003, the defense informed the government in a letter that "it is necessary that we obtain, as soon as possible, any and all forensic and expert reports, CV's etc. that are available."

As above stated, on January 9, 2004, the defense specifically requested by letter that the government disclose the 14 categories of scientific information which are discussed below. When the government refused this request, defendant filed a formal motion on April 8, 2004, and then, at the hearing of the motion on May 18, 2004, "the government agree(d) to produce most of the requested material...." (Doc. 225). Since the date of that agreement, the government has produced two batches of material responsive to the motion. In a letter dated August 20, 2004, the defense notified the government that the government is not in compliance with its agreement. On August 27, 2004, defense counsel Michael Burt conferred with Assistant United States Attorney William Chambers

about this matter and received the assurances as set forth below. On September 3, 2004, Mr. Burt sent Mr. Chambers a 22 page letter detailing the discovery matters still outstanding, as more fully described below.

The Scientific Discovery Provided by the Government and the Requested Discovery Still Outstanding

In order for this Court to fully understand the issues, it is necessary to set forth in detail the discovery provided by the government as it pertains to the scientific evidence in this case and the discovery requested by the defense in its motion.

According to defense records, the following scientific discovery was produced on the dates indicated:

Date	Description of Docs Produced
11-3-2003	BH-FBL (Rud 028)(FR004)-FBI lab reports 1-231
11-3-2003	BH-ABL (Rud 029)(FR004)- ATF lab reports 1-459
12-1-2003	AT-LAB (Rud 221)(FR020)- FBI and ATF lab reports 1-2980
12-29-2003	AT-NRT (Rud 171)(FR030)- NRT reports for Sandy Springs and Otherside 1-176
1-30-2004	AT-EXP (Rud 246) (FR048) 1-287
2-20-2004	BH-ABL (Lloyd Images) 460-1480
	BH-ABL (Rud 250) (FR057)-ATF lab reports 1481-3055
	BH-FBL (Rud 259)(FR057)- FBI lab reports 232-234
	BH-EXP (Rud 253, 273) (FR059)- Outside Experts 1-339
	BH-EXP (Rue Imgs)- 340-402
	BH-ABL (Rud 271) (FR059)- ATF lab reports 3056

2-24-2004	Expert witness summaries for Lloyd Erwin, Carl McClary, Larry Hankerson, Edward Bender, and Peter Dreifus.
	By the government's own accounting, the case jackets of government experts Robert Brissie, Carolyn Reck, Loring Rue were not provided
5-13-2004	AT-LAB (Rud 279) (FR062)- Additional FBI and/or ATF lab reports 2981- 3022
6-3-2004	Correspondence/Communication Log (2/3/98 - 5/13/04)
6-14-2004	BH-ABL (FR069): Case Jackets for Lloyd Erwin (Rud 298)(3187-4112) Carl McClary (Rud 299)(4113-4262) Peter Dreifus (Rud 300)(4263-4448) Larry Hankerson (Rud 301)(4449-4820) Miscellaneous evidence inventories (Rud 302)(4821-4853)
July 16, 2004	Expert witness summary for B. Ray Neely
8-23-2004	BH-ABL (FR072)(Rud 305)- ATF lab materials 5117-5330
	BH-FBL (FR072)(Rud 309)-FBI lab material 235-245

It is anticipated that the government will claim that the 6-14-2004 and 8-23-2004 productions represent substantial compliance with its agreement on May 18, 2004 to provide most of the 14 categories of information set forth in defendant's "motion for discovery of lab bench notes and other items crucial to a fair assessment of the government's scientific evidence" (Doc. 238), it is important to summarize what these two groups of documents contain and, more importantly, what they do not contain. As is stated in defendant's discovery motion, the documents provided prior to the filing of the motion in April 2004 consist primarily of conclusory lab reports which are of no assistance in evaluating what was actually done in this case and whether correct scientific procedures were followed.

The Material Produced on June 14, 2004

1. **Case Jacket for Lloyd Erwin (Rud 298)(3187-4112)**

The government's letter accompanying its production of June 14, 2004, states that the

"case jackets attached include the bench notes, work papers, test printouts, photographs, and chain of custody documentation" of "those witnesses/experts from the [ATF] Forensic Laboratories in Atlanta, Georgia and Ammendale, Maryland ... who performed laboratory and/or scientific analysis on the evidence in this case and who will testify in the United States' case-in-chief."

The letter also states that

"[t]he attached case jackets include all notes of said experts and all documentation in the custody of the BATFE Laboratories relating to the movement of evidence throughout the laboratories, the chain of custody of such evidence, procedures of chemical preparation of evidence, background runs for gas chromatograms, liquid chromatograms and mass spectra, equipment calibration data, blank runs, control data, and some lab protocol information."

By the government's own accounting, the case jackets of government testifying experts Robert Brissie, Caroyln Reck, Loring Rue, and B. Ray Neely were not provided. Also, contrary to the letter, the case jacket of Edward Bender was not provided. Bender is a key explosives residue expert for the government.

More fundamentally, although the government has evidently decided to treat it as such, **defendant's motion was not restricted to testifying witnesses**, but instead requested the government "to disclose laboratory bench notes (work papers), whether handwritten, typed, or electronically recorded, of **all** experts or technicians who performed any work, analysis, comparison, or testing on any of the evidence in this case." (Doc. 238, p. 1, (emphasis added)). The discovery provided indicates that numerous non-testifying technicians and experts performed forensic work on the evidence in this case.

As noted in the August 20, 2004 letter to the government, concerning Mr. Bender, Judge Putnam granted the government access to the defense's *in camera* submission in support of the discovery motion (Doc. 182). That submission states as follows:

"From its summaries, it appears clear that former FBI analyst and now ATF analyst Edward Bender played a crucial role in examining the explosives residue evidence in this case. In researching Mr. Bender's background the defense came across this reference in United States v. Gonzalez, 1996 WL 328601 (D.Del. 1996), dealing with the media's right of access to certain Brady documents turned over to the defense post-trial after Bender had testified as an explosive residue expert:

'The general contents of the documents were made known to the News Journal by the criminal defendant's unsealed motion for a new trial. Subsequent to the defendant's conviction, the prosecution gave certain documents of which it had just come into possession, containing allegations of past wrongdoing, misconduct, and possible evidence contamination by Edward Bender ("Bender"), who had testified as an expert witness for the government. The sealed documents included, inter alia, allegations of Bender's failure, while an explosives examiner at the Federal Bureau of Investigations ("FBI"), to follow FBI Materials Analysis Protocols in examining trace materials found on explosive fragments and residue, Bender's maintenance of a dirty and possibly contaminated work environment, his failure to sterilize laboratory glassware, and general allegations of professional incompetence.'

In the August 20, 2004 letter, the defense again specifically requested that the information provided as Brady material in the Gonzales case also be provided as Brady material in this case, along with any other Brady material in the government's possession regarding Mr. Bender or any other prosecution witness.

In the conference with the government on August 27, 2004, government counsel indicated that there were no case jackets on experts Robert Brissie, Carolyn Reck, Loring Rue, or B. Ray Neely, or on any of the non-testifying experts. Government counsel did admit that there were some medical records of Emily Lyon's relied upon by Dr. Rue which counsel was in the process of obtaining and scanning for production to the defense.

As to the non-testifying experts, government counsel stated that the ATF does not use any technicians and that the only non-testifying experts who examined any evidence in this case were ATF supervisors who merely performed technical reviews of work and did not produce any documentation of their review. Government counsel further indicated that the case jacket material for Mr. Bender may be scattered in with the Erwin case jacket, and that counsel believed that some of Bender's case jacket material would be included in the next batch of discovery which had not yet had scanned. Government counsel also indicated that the Brady material from the Gonzales case was being withheld from counsel by the Office of the Inspector General, but that counsel was pursuing alternative means to obtain the information either from the Justice Department in Washington or from Mr. Bender himself.

As to the non-testifying ATF experts who conducted technical reviews, the government provided documentation which indicates that the laboratory where these experts work is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). As such, the laboratory is governed by the ASCLD/LAB Laboratory Management and Operations Manual (hereinafter "ASCLD/Manual"¹). Section 1.4 of that manual states:

"Technical review of casework is an essential component of the laboratory's quality assurance program. The laboratory must have a written policy to establish the parameters for technical review (e.g., the number or percentage of case reports to be reviewed). The policy must define the scope of the review (e.g., review of bench notes, data, and other documents which form the basis for the scientific conclusion). The review policy must describe a course of action to be taken, should a discrepancy be found. The policy must also define how technical reviews are documented."

The defense has requested a copy of the technical review policy maintained by the ATF and any and all documentation of how such policy was followed in this case. To date, no such document has been produced by the government.

¹ See, <http://www.asclld-lab.org/legacy/aslablegacymanagement.html>

As to non-technical review, ATF experts such as Carolyn Reck and B. Ray Neely and any other ATF or FBI agent who performed scientific testing and analysis in this case, the defense has again requested copies of their case jackets or other form of documentation of their work. The defense has called the government's attention to the fact that in the expert summaries for both Carolyn Reck and B. Ray Neely, the government references these experts relying on his (or her) "work papers". The defense has requested the work papers referenced in the summaries. The defense has also specifically requested some form of documentation as to how Ms. Reck arrived at the conclusion that "[a] manufactured radio remote -control system was employed to command detonate this [explosive] device." To date, the government has failed to provide that requested documentation.

The defense has also searched the Erwin case jacket material for any indication of the case jacket of Mr. Bender, and has only found one single conclusory chart authored by Mr. Bender (BH-ABL-003292-3293). There are a few pages of Mr. Bender's raw data in Mr. Dreifus' case jacket, but that data relates to his examination of three videotapes on which he found no explosives residue. See, BH-ABL-004411-4428. The defense needs Mr. Bender's case jacket and the Brady material from the Gonzales case in order for the defense experts to complete their analysis and review. Mr. Bender played a key role in allegedly verifying the preliminary presumptive explosive's detection field testing performed by Mr. Erwin. The proper assessment of the work of both of these experts therefore depends on the validity of what exactly was done by Mr. Bender. His

conclusory chart, which contains no idea of the exact analytical procedure he followed, is insufficient to conduct meaningful peer review of his work. The defense has also requested and not received the owner's or methods' manual for any procedure he employed.

Other deficiencies in the Erwin case jacket material are as follows. As was conveyed to the government on August 27, 2004, all of the EGIS printouts are too small and too poorly copied to be read properly by our experts. Government counsel suggested during the conversation of August 27, 2004, that defense counsel should inspect the original printouts to see if that will solve the problem. Government counsel indicated that this material could be made available the week starting September 7, 2004. The defense plans to meet with government counsel that week to conduct the inspection.

Another major problem is that the basic steps of the various analytical techniques mentioned in Erwin's case jacket are not documented in his case notes or in any procedural manual or protocol which has been provided to date. Government counsel states in his cover letter of June 14, 2004, that "some" lab protocol information has been provided, but this is incorrect. Erwin's case jacket contains isolated pages which give a hint that he used a "XRF" (BH-ABL-003814), a "FIIR" (BH-ABL-003817), a "GC/TEA" (BH-ABL-003826), an "EDAX Eagle uProbe" (BH-ABL-003940), a "TLC" (BH-ABL-004095), an "EGIS I Model E3000" (BH-ABL-004097), and a "Nicolet Magna 560 FTIR and NICPLAN microscope" (BH-ABL-005305). As with any complicated piece of scientific equipment, each of these machines comes with an owner's or methods' manual

which sets forth the necessary procedures, methods, and safeguards which must be followed to allow the machine function properly and accurately. The defense has requested and needs those manuals for each machine or technique used in order for our experts to access whether correct scientific procedures were followed in this case. To date, the government has not produced those manuals.

The ASCLD/Manual states in Section 1.4:

“Examination documentation is usually generated by the laboratory and includes references to procedures followed, tests conducted, standards and controls used, diagrams, printouts, autoradiographs, photographs, documentation of observations, and results of examinations. ... Examination documentation, such as case notes and records of observations whether electronic or hard copy are subject to subpoena or discovery and must be of a permanent nature. ... When instrumental analyses are conducted, operating parameters must be recorded. ... Documentation to support conclusions must be such that in the absence of the examiner, another competent examiner or supervisor could evaluate what was done and interpret the data. Acceptable ways to document the basis for conclusions derived from evidence examination, include, but are not limited to: a narrative description of the examination process and observations made, photographs, photocopies, diagrams, drawings, worksheets which provide spaces or sections for the insertion of data or other observations made during various steps of the examination process, or a combination of two or more of these approaches.”

Based on the information provided in Mr. Erwin’s case jacket, and in the absence of documentation of the owner’s or methods’ manuals that govern each technique employed and some description of whether Mr. Erwin followed proper procedure in this particular case, there is no way another competent examiner or supervisor could evaluate what was done and interpret the data. The defense has therefore again requested that this information be provided.

Government counsel did provide in the production of August 23, 2004, an ATF document entitled Standard Approach to the Examination of Explosives. See, BH-ABL-005129-5147. This document, dated September 1, 1993, pre-dates the development of many of the analytical techniques used in this case. Consequently, this document contains no mention of EGIS, the uProbe, or how these devices work. The descriptions which are provided are too vague to be of any use in determining the procedures that were used in this case. For instance, the document states that for post blast explosive examinations

“the examiner could proceed directly to extracting the debris with water and examine the extract for traces of ammonium and/or sodium nitrate or other ingredients. If not, then the debris sample can then be extracted with an organic solvent which will dissolve practically all organic explosives. ... These extracts can then be analyzed by one or more of the following methods: TLC, GC, HPLC (with appropriate detection), IR, and supported by the comparisons to standard explosive compounds.”

(Id. at p. 13). The sole description of gas chromatography in the Standard Approach to the Examination of Explosives is as follows:

“GC is a widely used method for identifying high explosives such as NG, EGDN, RDX and dTNT, etc. and explosive components such as propellants, plasticizers and stabilizers. (See Yinon and Zitrin) It can be used with a variety of universal detectors such as flame ionization detector or a more sensitive detector for explosives such as the Thermal Energy Analyzer.”

Id. at 17. There is no further description of a Thermal Energy Analyzer or how it works. Again, such descriptions in no way allow another competent examiner or supervisor to evaluate what was done in this case and to assess whether proper procedures were followed.

Furthermore, other issues exist with respect to Mr. Erwin's case jacket. An "administrative worksheet" is a document which lists the searching agents, the task performed by each, and other important information. Although there is an administrative worksheet available for the search of Cal's Mini Storage on February 2, 1998 (BH-ABL-003191) and for the search of the Nissan Truck on February 9, 1998 (BH-ABL-003305), no administrative worksheet has been provided for the search of the residence on Caney Creek Road on February 4, 1998. The defense has requested but not received this document.

Documents BH-ABL-003752 thru 003762 indicate that items were seized at the crime scene on January 29, 1998, by FBI agents Daniel Girsh, R. Scott Broshears, Tracy Crane, and David Jernigan; by ATF agents Joseph Kennedy, Ronnie Baughn, Joseph Russell, Carolyn Reck Owens, Larry Morrissey, Anthony May, Luis Velzco, David Sanford, Johnny Green, Steven Linehan, John Springer, Brian Hoback, Lloyd Erwin, Edward Bender, Bill Groom, Dave Nygren, Bart Moro, Benjamin Southall; by Birmingham Police Department officers Pat Rhodes, Chris Jones, Mike Roberson, Bill Persons, Richard Lawley; by Jefferson County Coroner Dr. Robert Brissie; by Alabama Fire Marshall Michael Haynes; by University of Alabama police officers Alice Bailey, and Penny Goodman. The defense has requested that the case jackets, or at least the field notes, of these agents be provided, along with any documentation of what decontamination procedure these agents employed or underwent before beginning the search. The defense also requested documentation of what exposure these agents had to

EGDN prior to the search. To date, the government has provided no such information.

Documents BH-ABL-003218 thru 003220 indicate that items were seized at Caney Creek on February 4, 1998, by agents Stan Stoy, Richard Strobel, Greg Czamopys, Douglas Deedrick, Kennedy, James Zopp, and Joe Boykin. Agents Thomas Mohnal, John Golder, and Brian Roepe apparently were also present during the seizures. The defense has requested that the case jackets, or at least the field notes, of these agents be provided, along with any documentation of what decontamination procedure these agents (and Lloyd Erwin) employed or underwent before beginning the search. The defense also requested documentation of what exposure these agents had to EGDN prior to the search. To date, the government has provided no such information.

Document BH-ABL-003305 indicates that FBI agents Terry Beyers, Eric Blowers, Jeffrey Showers, Raymond Duda, Thomas Mohnal, Douglas Deedrick, Joanne Morley, and W. Mark Whitworth, and ATF agents Lloyd Erwin, Edward Bender, Theresa Stoop, Joe Kennedy, Terry Bohan, Larry Hankerson, and Carolyn Reck-Owens participated in the search of the Nissan truck on February 9, 1998. The defense has requested that the case jackets, or at least the field notes, of these agents be provided, along with any documentation of what decontamination procedure these employed or underwent before beginning the search. The defense also requested documentation of what exposure these agents had to EGDN prior to the search. Also, since this search occurred at the National Guard Armory in Murphy, N.C., it has been requested that the government provide information regarding prior exposure of this particular sight to EGDN. To date, the

government has provided no such information.

2. Case Jacket for Larry Hankerson (Rud 301)(4449-4820)

As indicated in the defense letter of August 20, 2004, the major problem with respect to Mr. Hankerson and the other experts who performed comparative analysis in this case is that the government has not yet provided the basis for their conclusions so that defense experts can identify and independently assess the precise points of comparison relied upon. With respect to non-explosive evidence, defendant's motion pinpoints the type of information requested and the legal authority for the request:

“What protocol was used to match the prints? How many points of comparison 'matched' and where exactly are they on the latent and known prints? See, United States v. Robinson, 44 F. Supp. 2d 1345 (N.D. Ga. 1997) (testimony of the government's fingerprint expert would be suppressed as a discovery sanction for government's failure to turn over written summary of witness' testimony including basis and reasons for his opinions and 'all of the points of identification on which the government's expert would rely'). These same questions arise in relation to the 'tape, hose clamps, foil, metal, cord, silicone sealant, wire connectors, cement, and nails' comparisons performed by Lloyd Erwin, the handwriting comparisons of Carl McClary, and the bomb and crime scene reconstructionists. The other expert summaries and reports, involving crime scene and bomb reconstruction and pathology are also deficient because they do not include (a) a description of the analytical techniques used in the test requested by the government or other party, (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, or (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions. (Motion, p. 12) [Doc.181]

In its production of August 23, 2004, the government did provide an ATF document entitled Standard Approach for Fingerprint Examinations (BH-ABL-005180 thru 5197) and another titled Standing Operating Procedures: Questioned Document Procedures

(BH-ABL-005148 thru 5178). However, the government did not provide any photographs or other documentation showing the points of comparison being relied upon by Mr. Hankerson or the other print experts. The government did provide some badly copied photographs of unmarked latents, but for the reason stated in the Robinson case, providing even clear copies of latents does not satisfy the government's discovery obligation under then Rule 16(a)(1)(G):

“When a defendant faces an expert witness at trial there are two issues. The first is whether the witness's testimony is entitled to appreciable weight based on the reasons given for the opinions stated. The second issue is whether or not the prints were in fact made by the same person. If a defendant has a clear copy of the print in question, he may obtain his own expert to offer an opinion on the ultimate fact and, therefore, the defendant is not prejudiced in this regard by a failure of the government to provide the bases for its expert's opinion.

“A defendant, however, is never required to introduce any evidence and, therefore, the defendant has a right to predicate a trial strategy solely on an attack of the opinion evidence offered by the government. If a defendant does not have the bases for the government's opinion, there is no way the defendant's counsel can effectively cross-examine the expert. It is this issue, which goes to the fairness of the trial, that the court must always keep in mind in dealing with discovery issues in criminal cases.”

Robinson, 44 F. Supp. 2d at 1347-1348.

In the discussion with government counsel on August 27, 2004, the prosecutor acknowledged understanding of what we were requesting and indicated that he would pursue this issue with Mr. Hankerson and the other experts. Until the requested information is provided the defense will not be in a position to complete the analysis of Mr. Hankerson's conclusions.

The second issue with respect to Mr. Hankerson concerns defendant's request in

the letter of August 20, 2004, for confidential access by the defense expert to the original latents and known prints of Mr. Rudolph used by Mr. Hankerson. Government counsel indicated that he was working on this issue but had not yet decided how to proceed, and that he would work on locating the requested items upon his return to work on September 7, 2004.

A third issue concerns the document the government provided titled Standard Approach for Fingerprint Examinations (BH-ABL-005180 thru 5197). On the crucial issue of what objective standard Mr. Hankerson used to reach his opinion that the latents prints were in fact made by Mr. Rudolph, the document is silent. The government's expert summary merely states that "he determined that the friction ridges in question bore sufficient quality and quantity of detail to individualize them." The defense has informed the government that defense experts need to know what Mr. Hankerson considers to be a "sufficient quality and quantity of detail." Is there a numerical standard? If so, where is it documented?

The Standard Approach for Fingerprint Examinations also states that "[t]he processing techniques used will be consistent with the techniques entered in the Procedures Manual," and that "[i]t is the responsibility of every fingerprint specialist to insure that this Standard Approach for Fingerprint Examinations, the Operating Manual, and the Procedures Manual are routinely updated to accurately reflect the professional requirements of their position." The defense has requested a copy of the Procedures Manual and the Operating Manual referred to in the Standard. To date, the government

has failed to produce those documents.

The Standard Approach for Fingerprint Examinations also states that “latent prints must be reexamined for verification” and that “[c]oncurrence must be recorded in case notes.” *Id.* p. 5181. The government’s expert summary states that “the fingerprints were examined by a second examiner.” For the latent prints recovered in the Nissan truck, Mr. Hankerson’s report has a signature line which states: “Reviewed by Nancy Davis, Chief, Identification Section.” The line is unsigned, both in the copy of this report attached to the expert summary and in the copy recently produced in discovery. See, BH-ABL-004503. The next page of discovery, BH-ABL-004504, has a box titled “idents verified by:”, which is initialed by someone, but the defense cannot tell by whom. The defense has requested the government to identify the person, if any, who verified Mr. Hankerson’s work and provide their case jacket or other documentation of their work, including points of comparison (as outlined above), and their expertise in conducting such verifications. To date, the government has failed to provide such information.

Mr. Hankerson’s report of the latents found in the Nissan truck states that “examination of Exhibits 55 through 59 revealed three latent prints of value,” and that the comparison of the latents with the inked fingerprints of Eric Rudolph revealed that Rudolph made “the latent prints recovered from the driver’s side seat belt buckle (Exhibit 57 and 58).” See, BH-ABL-004503. The defense has requested clarification as to whether this means that the three prints of value recovered from Exhibits 55 through 59 were all on Exhibits 57 and 58, or whether there are latent prints remaining that do not

match Mr. Rudolph. This same question applies to Exhibit 7, where Mr. Hankerson states that there were “latent prints of value on Exhibit 7” and that Mr. Rudolph made “the latent prints on Exhibits 7a, 7b, and 7c.” Does he make all the prints on exhibit 7, or are there prints of value that remain unidentified? To date, the government has failed to address these questions.

Finally, the Mr. Hankerson's expert summary indicates that Mr. Hankerson employed a microscopic procedure. In the production of August 23, 2003, the government produced a Nicolet Magna 560 FTIR and Nicplan Microscope Instrument Log and Maintenance Record (BH-ABL-005305 thru 5313) which appears initialed by and related to the microscopic work of Mr. Erwin. This document is of value because it documents the fact that the laboratory was having problems with this particular microscope. The defense has requested but not yet received a similar maintenance log for the microscope used by Mr. Hankerson, and any microscope used by any other witness.

3. Case Jacket for Carl McClary (Rud 299)(4113-4262)

As with Mr. Hankerson, the government has not provided the basis for Mr. McClary's conclusions regarding authorship of certain documents. It must be noted that the document provided, Standing Operating Procedures: Questioned Document Procedures (BH-ABL-005148 thru 5178) explicitly requires that the examiner “make written notes on the photocopies of a representative sample of the significant characteristics of the evidence documenting the similarities and differences of each item.” For the reasons stated above, the defense needs that information to evaluate the validity of

Mr. McClary's opinions. The defense also needs confidential defense expert access to the originals of all questioned and known exemplars. As indicated above, government counsel has indicated that he would work on these issues when he returned to the Office on September 7, 2004.

Also, as with Mr. Hankerson, it is unclear who performed the required technical review of Mr. McCray's work. All of Mr. McClary's reports are signed by Nancy Davis as the "Chief of the Identification Section." However, some of Mr. McCray's case notes appear to be initialed by someone but the identity and expertise of that person remains unknown. The Standing Operating Procedures document provided by the government states: "A complete *technical review* is conducted by another qualified examiner and the worksheet is initialed and dated." ... [A] draft of the final report is initialed by the section chief for *administrative review*." As was indicated to the government in a telephone conversation of August 27, 2004, ASCLAD/LAB distinguishes between a "technical review" and an "administrative review." An administrative review is concerned primarily with the format of the report, not its technical accuracy. It appears that Nancy Davis was signing the reports of Mr. McClary (and Mr. Hankerson) as an administrative reviewer and not as a technical reviewer. The defense has requested the government to identify the person, if any, who technically reviewed Mr. McClary's work and provide their case jacket or other documentation of their work, including points of comparison, and their expertise in conducting such verifications. To date, the government has failed to honor those requests.

Like the Fingerprint Protocol, the Handwriting Protocol does not set forth an objective standard of comparison to be used in making a claim of authorship. The defense has requested the government to provide this information. To date, the government has provided no such information. Also, the Protocol states that a required item is “sufficient known standards/writings of each individual suspect to be compared.” The defense has requested the government to clarify what “sufficient” means? To date, the government has not provided such clarification.

Finally, the Protocol indicates that a stereoscopic microscope is to be used in making the comparisons. The defense has requested the government to provide the maintenance log of the instrument used by Mr. McClary. To date, no such log has been provided by the government.

4. Case Jacket for Peter Dreifus (Rud 300)(4263-4448)

The problems encountered in relation to Mr. Dreifus’ case jacket are similar to those encountered with respect to Mr. Erwin. At page BH-ABL-004266, Mr. Dreifus’ notes state that “the samples were run by GC-TEA, GC-MS, HPLC-TEA.” The very next page is a “GCQ Analysis list” which states that the method being used is “NICIexpl.” The very next page describes the same method as the “Finnigan GC method.” The government has not provided the defense with any of the user’s or methods manuals for any of the techniques utilized by Mr. Dreifus. The government has produced only chromatogram plots, GCQ log files, and, on August 23, 2004, some “calibration records for the GCQ.” See, BH-ABL-000513.

For reasons stated above, the user's or methods manuals for all of the techniques utilized by Mr. Dreifus are required by the defense. Defendant must have the maintenance, calibration, and repair logs for the "GCQ" and/or other machine[s] utilized by Mr. Dreifus, similar to the logs produced by the government for the machines used by Mr. Erwin. The defense requires these same logs for any machine used by Mr. Bender.

The importance of this information is indicated by the logs produced for the EGIS machine. Those logs document numerous problems and calls for assistance from the manufacturer. The "Finnegan GQ" machine utilized by Mr. Dreifus is apparently an outdated model of what is now manufactured by the Thermo Corporation as the "Finnegan Polaris/GCQ Plus." Although Thermo does not maintain any online information about the obsolete machine used by Mr. Dreifus, it is significant that the manual for the newer machine states that problems may be encountered in the following areas even with respect to the newer technology:

- “ • Communication Problems
- High Vacuum Problems
- Heated Zone Problems
- Filament and Lens Control Problems
- Ion Trap Control Problems
- Tuning Problems
- Sensitivity Problems
- Stability Problems

- Linearity Problems
- Contamination Problems”

Finnegan Polaris/GCQ Plus Hardware Manual at page 72. See, http://www.thermo.com/eThermo/CMA/PDFs/Various/File_20793.pdf.

Inspection of the maintenance and repair logs of the scientific testing machines employed by the government's experts is necessary in order to allow the defense to determine whether such problems exist in this case.

5. Miscellaneous evidence inventories (Rud 302)(4821-4853)

This “case jacket” does not relate to a particular expert and appears to contain miscellaneous chain of custody documents on items that are not at issue.

At the discussion on August 27, 2004, when counsel for the government and the defense discussed many of the issues outlined in this motion, government counsel stressed that many of the defense’s concerns were addressed in the most recent production of August 23, 2004 or, if not, would be addressed in yet another batch of discovery which government counsel had not yet had a chance to obtain and scan. Following the conversation, defense counsel thoroughly reviewed, page-by-page, the production of August 23, 2004. The review shows that the material produced on August 23, 2004 is as follows:

DOCUMENT	CONTENTS
BH-ABL-005117 thru 005125	ASCLD/LAB correspondence indicating current accreditation for ATF’s Atlanta Lab and an expired accreditation for the National Laboratory Center.

BH-ABL-005126-5128	Floor plans for ATF labs in Atlanta and Washington
BH-ABL-005129 thru 5147	ATF, <i>Standard Approach to the Examination of Explosives</i>
BH-ABL-005148 thru 5178	ATF, <i>Standard Operating Procedure: Questioned Document Department</i>
BH-ABL-005179 thru 5183	ATF, <i>Standard Approach For Fingerprint Examinations</i>
BH-ABL-005198 thru 5199	Czarnopys, <i>Explosives Scene Contamination, Protocols For Prevention and Clean Up</i> , AAFS 1999 Annual Meeting
BH-ABL-005200 thru 5202	Czarnopys, <i>Explosives Decontamination of Laboratory Workbench Surfaces</i> , AAFS 2000 Annual Meeting
BH-ABL-005203 thru 5240	Powerpoint for 2000 AAFS presentation
BH-ABL-005241 thru 5289	Powerpoint for 1999 AAFS presentation
BH-ABL-005290 thru 5295	Instrument Log and Maintenance Record for EGIS #1113 (6-25-97- 1-9-01)
BH-ABL-005296 thru 5304	Eagle u-Probe User Log & Calibration Records (5/28/98-2/15/2000)
BH-ABL-005305 thru 5313	Nicolet Magna 560 FTIR and Nicplan Microscope Instrument Log and Maintenance Record (6/11/99-2/17/2000)
BH-ABL-005314-5329	Calibration records for the GCQ provided by Peter Dreifus (2/8/98-2/17/98)
BH-ABL-005330	Birmingham blast Crater Field test 1-30-98
BH-FBL-000 235 thru 245	Miscellaneous FBI lab reports

While the defense greatly appreciates the effort which the government put into collecting and producing these records, the records do not address many of the concerns

outlined above. Furthermore, a brief review of the 14 categories of information requested in the defense's discovery motion will reveal other outstanding discovery issues.

Information Requested in the Defense Discovery Motion (Doc. 182)

1. **Any photos, including those used to confirm or document results, of items and test runs which are used to confirm results - in this case, that may include print-outs of the chemical analysis charts/run.**

This item is adequately addressed above.

2. **Bench notes, including but not limited to: a) procedure of chemical preparation of evidence items to be analyzed, such as extraction procedure, solvents used and b) gas chromatograms, liquid chromatograms and mass spectra for background runs (carried out before analysis of evidence items for calibration/quality control and assurance).**

For the explosives' examinations, there is no description of the extraction procedure used by Mrs. Erwin, Mr. Bender, or Mr. Dreifus or the solvents or other chemicals used in their testing. There is also no documentation of any quality control/assurance testing of those solvents or chemicals. The defense has specifically requested but not received this information

3. **Chain of custody logs**

The government's production of August 23, 2004, included several chain of custody binders which the defense is still in the process of reviewing to determine if they alleviate some of the problems detailed in earlier correspondence by Mr. Bowen dated February 23, 2004.

4. **Lab protocols**

This item is adequately addressed above, with one exception. Following the

conference on August 27, 2004, the government sent Mr. Burt some correspondence including an email from Gwen Lefler, who is identified as the Quality Manager for the ATF National Laboratory Center in Ammendale, Maryland. The defense assumes that there is someone who holds the same position for the Atlanta Laboratory. According to the ASCLAD/LAB Manual,

“Responsibilities of a quality manager should include the following:

Maintain and update the quality manual

Monitor laboratory practices to verify continuing compliance with policies and procedures

Evaluate instrument calibration and maintenance records

Periodically assess the adequacy of report review activities

Ensure the validation of new technical procedures

Investigate technical problems, propose remedial actions, and verify their implementation

Administer proficiency testing and evaluate results

Select, train, and evaluate internal auditors

Schedule and coordinate quality system audits

Maintain training records of laboratory personnel

Recommend training to improve the quality of laboratory staff

Propose corrections and improvement in the quality system.”

Obviously, a laboratory following this guideline necessarily generates an enormous amount of material, such as Quality Assurance and Quality Control Manuals, which are properly classified as lab protocols. The ASCLD/LAB Manual specifically provides that

“[t]o ensure that everyone fully understands what the expectations are, all elements of the quality system must be clearly articulated in a quality manual.” The defense has specifically requested production of the Quality Assurance and Quality Control Manuals outlined above, as well as production of the other quality control documents required to be maintained by the quality manager of both ATF labs. To date, the government has not provided those documents.

5. Equipment calibration data, equipment specifications and manuals for all equipment used.

This item is adequately addressed above. However, it is important to note that the ASCLD/LAB Manual provides:

“The written technical procedures ... should include descriptions of sample preparation methods, controls, standards, and calibration procedures. They should also include a discussion of precautions, possible sources of error, and literature references. Reagents must be labeled with the identity of the reagent and the date of preparation or 'lot' number. Records must be maintained identifying who made the reagent and that it was tested and worked as expected to check the reliability of the reagent. This will give the examiner the necessary resource material to support written conclusions and expert testimony.”

The Manual also provides that “standards and reagents used must be of satisfactory quality. A certificate of analysis received with a drug or other standard will generally serve to establish the quality of the standard.” The defense has requested but not yet received documentation showing compliance with these requirements.

6. Training and experience of technicians who participated in the testing.

This item is adequately addressed above.

7. ASCLD accreditation information: the proficiency data, testing results and

audit assessments.

As indicated above, the only ASCLD accreditation information provided is the correspondence at BH-ABL-005117 thru 005125 which indicates current accreditation for ATF's Atlanta Lab and an expired accreditation for the National Laboratory Center. The proficiency data and audit assessments mandated by ASCLD/LAB have still not been produced by the government.

The ASCLD/LAB Manual provides that "[i]n order to demonstrate compliance with proficiency testing standards, the laboratory must document that each examiner has successfully completed either an internal and/or external proficiency test in his/her respective discipline(s)." It further provides that "[a] laboratory must participate annually in at least one external proficiency test for each discipline in which it provides services, with the exception of DNA", and that "[l]aboratories should proficiency test annually in clearly defined subdisciplines in which the laboratory conducts examinations. ... includ[ing] ... explosives." It further provides:

"In addition to participating in external proficiency testing, a laboratory should conduct proficiency testing using blind tests prepared internally or externally and submitted as normal casework evidence or by re-examination by another examiner of evidence on which casework was previously completed. A laboratory must perform at least one such test annually in at least one-half of the forensic disciplines in which it provides services."

Regarding audits, the Manual provides:

"Each laboratory which is accredited as of January 1, must submit an Annual Accreditation Audit Report ... for the previous calendar year to ASCLD/LAB by April 1 of that year. ... Each laboratory must conduct the annual audit using the standards and criteria of the manual which is in effect at the time of the audit, regardless of the manual version under which the

laboratory was accredited. ... A written report should be prepared soon after the audit has been conducted. This report must identify problem areas and the remedial action required. Documentation of annual audits conducted between accreditation cycles must be maintained and made available during an ASCLD/LAB inspection.”

The Manual further provides:

“In addition to the annual audit, an annual review of the quality system is essential for ensuring that laboratory management can continue to be confident that all measures are being taken to provide the highest quality service using 'state-of-the-art' forensic technologies. ... Documentation of annual quality system reviews conducted between accreditation cycles, although not submitted to ASCLD/LAB, must be maintained by the laboratory and made available during an ASCLD/LAB inspection.”

In addition, ASCLD/LAB itself conducts independent audits as part of the accreditation process and these audits are typically shared with and retained by the laboratory.

The defense has renewed its request for all proficiency testing data for any of the named experts or technical reviewers. The defense has also renewed its request for all relevant audit reports in the possession or under the control of the ATF laboratories or ASCLD/LAB.

During the conference on August 27, 2004, government counsel indicated he would check on this issue and get back to defense counsel. Government counsel also faxed three pages of correspondence between Ms. Lefter and Michael Creasy, who is identified as an ASCLD/LB Quality Manager. In her email of May 5, 2004, Ms. Lefter inquires how long ASCLD/LAB retains its inspection and report records. Mr. Creasy responds that the records are retained for five years and that once a laboratory has been reaccredited, the previous inspection records are purged. In a letter dated August 6, 2004,

Mr. Creasy indicates that “[t]he accredited laboratory should maintain records that pertain to their current accreditation period,” and “should maintain all records that substantiate their compliance with the standards under which they were accredited.” These documents should exist but the government has failed to provide them despite the repeated defense requests.

8. Any correspondence or phone records of calls between examiners, between examiners and lawyers, between examiners and crime scene people.

The defense has been provided only Evidence Transmittal Forms/Logs (which are requests for analysis and memos to supervising agents) but nothing that could be fall within the requested “scientific correspondence.” In accordance with Judge Putnam’s order, the government did provide an eight-page communication log briefly describing 93 scientific communications. It appears from the log that only 13 of the letters (letter of 1-30-04, 2-1-04, 2-2-04, 2-9-04, 2-10-04, 2-11-04, 2-11-04, 2-12-04, 2-12-04, 2-13-04, 2-23-04, 3-13-04, 3-18-04) constitute genuine work product that could be described as correspondence between a government lawyer and an expert. The defense has requested production of the remainder of the correspondence as it is highly relevant to the scientific procedures followed or not followed in this case.

9. Any in-house testing or studies that relate to testing done in the labs.

No such information has been provided. As was explained to Judge Putnam at the hearing on May 18, 2004, this request relates specifically to the internal validation standards mandated by ASCLD/LAB.

The ASCLD/LB Manual provides:

“The proper validation of a new technical procedure ... requires a complete understanding of the theoretical basis for the method. Such knowledge provides a means of assessing the specificity and limitations of the method and predicting possible sources of error. The method must be tested using known samples. Should the new method parallel or supersede an existing one, the two should be compared on split samples. The known samples should be designed to resemble actual evidence materials as closely as possible so that the effects of such factors as matrix, sample age, degradative environment, and sample homogeneity are taken into account. This is particularly important when attempting to apply to forensic materials some methodology originally developed for routine chemical or clinical samples. If the analysis provides quantitative data, the validation study should include an estimation of its accuracy and precision at concentrations which are representative of casework samples .

“The method must be subjected to a validation study. This may be done internally, externally, and/or collaboratively. Exchange of blind and reference samples with another competent laboratory is particularly useful for detecting any internal systematic error. Written documentation for each validation study needs to be maintained for future reference.

The defense has requested but not received any and all internal validation studies conducted on any of the analytical techniques used in this case.

10. Details and results of monitoring the laboratory for explosives traces and results. Similarly, results from monitoring any personnel or sites that may have any connection with relevant exhibits.

The only contamination studies provided are the two papers by ATF Agent Czarnopys noted above. However, these studies are ones in which the agent intentionally contaminated lab benches and clothing typically worn by examiners at bomb sites in order to assess whether cross-contamination could occur and how to prevent it. The conclusions of the 1999 study were:

“... (1) ... exposure to post-blast crime scenes results in detectable levels of contamination on personnel, (2) contamination can be effectively removed using (dry-cleaning, machine-washing, solvent wash, or soap and water

mixture) methods ... and (3) if decontamination is not possible, have separate gear or tyvek suits, gloves and/or boot covers should be worn.”

The results of the 2000 study were that “detectable levels of explosives can be removed from a contaminated workbench by relatively simple means (thorough cleaning of the surface with 409 spray cleaner).” The 2000 study also concludes that

“low level contamination can exist and appropriate laboratory policies for decontamination must be in place in laboratories performing explosive residue analysis. ... [D]econtamination of laboratory benches must be a necessary part of the laboratories protocol.”

These studies reinforce the defense request for contamination information pertinent to this case. Specifically and especially in light of the studies and considering the infinitesimal amounts of explosives residue involved, the defense must know exactly what appropriate laboratory policies for decontamination were in place in the laboratories performing explosive residue analysis in this case. The defense also needs documentation that these decontamination procedures were in fact followed. The defense also must have any documentation of any preexisting exposure to EGDN by any of the lab personnel collecting or testing evidence in this case, by any of the clothing worn or tools used by these personnel, and by any of the locations where the evidence in this case was located or examined, including the ATF laboratories, the mobile bomb unit utilized at such places as Cane Creek and the National Guard Armory where the Nissan truck was examined. This information has been requested but not received

11. Laboratory layout, with reference to what is done where and by whom.

The government has provided a 1999 layout for the Atlanta ATF Laboratory, a January 2002 layout for the same laboratory, and an undated layout for the National

Laboratory Center. The last layout appears to relate to the laboratory in Ammendale, Maryland. The work performed by Edward Bender and Peter Dreifus in 1998-1999 was done at the Forensic Research Laboratory in Rockville, Maryland. The defense has asked the government to provide a laboratory layout for that lab. That request has not been satisfied.

12. Specifically identify who did what.

In the conversation on August 27, 2004, government counsel indicated that the ATF does not utilize technicians and that the only experts who did anything with respect to the evidence in this case are the experts named in the summaries or the supervisors who signed off on the reports. Absent contrary information, there is adequate compliance with this request.

13. Details of storing and routing of exhibits through the laboratory.

The case jackets and chain of custody binders recently provided would seem to address this issue. However, the defense is still reviewing the multiple chain of custody binders provided on August 23, 2004.

14. Details of any other explosives cases conducted by the laboratory around the time of and before the Rudolph case.

On August 27, 2004, government counsel faxed a brief one-page statement of unknown authorship which states in its entirety:

“Two cases were in the Atlanta laboratory within a 3-month time frame (before and after) of the Birmingham incident on 1/29/98: 96A0379 (1), 98A0090 (3). One case was in the Washington laboratory within the above time frame: 97N0010.”

The defense assumes that the cases referred to are EGDN cases. Based on this assumption, the defense has requested but not yet received more information about these cases: when, exactly, were these cases in the lab?; how much EGDN was processed through the lab on these cases?; what decontamination procedures, if any, were followed in relation to these cases. The defense has requested information about whether other EGDN cases were processed through the mobile lab at or about the same time as the unit was utilized in this case.

In light of all of the foregoing, the defense should not be expected to meet the current deadline of September 7, 2004, because it does not yet have all or even a substantial portion of the relevant scientific information requested the defendant and promised by the government back on May 18, 2004. Government counsel has promised to continue to work on the issues outlined above, but he will not begin such work until September 7, 2004, the current deadline for the defense summaries. The defense experts cannot formulate defensible opinions without access to the information requested above.

Legal Argument

Federal Rules of Criminal Procedure, Rule 16(b)(1)(C) provides:

“Expert witnesses. -- The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if --

- (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
- (ii) the defendant has given notice under Rule 12.2(b) of an intent to

present expert testimony on the defendant's mental condition.²

The Advisory Committee comment on this 1993 amendment to Rule 16 states:

“Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C) to reciprocal discovery of the same information from the defendant. The disclosure is in the form of a written summary and only applies to expert witnesses that each side intends to call. Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion. ... The amendments are not intended to create unreasonable procedural hurdles. As with other discovery requests under Rule 16, subdivision (d) is available to either side to seek ex parte a protective or modifying order concerning requests for information under (a)(1)(E) or (b)(1)(C).”

“In other words, so ‘long as the government complies with its own disclosure obligations, Rule 16(b)(1)(C) ... requires that the defendant disclose to the government a written summary of an expert witness's proposed testimony.’” United States v. Sarracino, 340 F. 3d 1148, 1170 (10th Cir. 2003). The court in Sarracino found that the defendant had violated his discovery obligation under the Rule but nevertheless concluded that exclusion of the defense expert’s testimony was error, holding that “it would be ‘a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings.’” Id. at 1170. Accord, United States v. Finley, 301 F. 3d 1000 (9th Cir. 2000).

In the present case, the defendant long ago asked for crucial discovery of information pertinent to an independent evaluation of the government’s expert witnesses.

² Rule 16(b)(1)(C) does not apply to penalty phase expert witnesses. See, United States v. Beckford, 962 F. Supp. 748, 754 n. 3 (E. D. Va. 1997)

The government agreed to provide such information as long ago as May 18, 2004, but as indicated above, much of the needed information has still not been disclosed. The hallmark of a good expert witness is one who does not reach premature conclusions based on partial information. Indeed, if an expert does so, he or she risks devastating impeachment. Mr. Rudolph's experts should not be put in the position of being forced to formulate premature opinions because of the government's tardiness in discovery compliance. This case is still many months away from trial. If the government provides the discovery requested back in May, the defense will be ready to file expert summaries within 30 days of full compliance and the government will have plenty of time before the current trial date to prepare to meet defendant's expert witnesses.

CONCLUSION

It is requested that this Court amend the Order of June 23, 2004, (Doc. 255) and extend the time for filing Rule 16 summaries to 30 days following full compliance with defendant's motion for discovery of laboratory bench notes and other items crucial to a fair assessment of the government's scientific evidence.

Dated: September 3, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by first class United States mail, properly addressed and postage prepaid, on this 3 day of SEP, 2004 to:

Michael Whisonant
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